90-1947

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN K. YEE AND IRENE S. YEE, H.N. AND FRANCES C. BERGER FOUNDATION, MOUNTAIN SHADOWS MOBILE HOME ESTATES, RICHARD C. KUEBLER, dba MOONGLOW MOBILE HOME PARK, CASA DE AMIGOS MOBILE HOME ESTATE, VISTA VERDE, LTD., IMPERIAL ESCONDIDO MOBILE ESTATES and MILDRED D. TACEY,

Petitioners,

vs.

THE CITY OF ESCONDIDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitute an impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?

2. Is there a violation of substantive due process under local rent controls for mobilehome parks, which do not provide for vacancy decontrol, where the effect of the ordinance is to merely transfer the value of the right to occupy at a reduced rate from the parkowner to the departing tenant, and in no way protects the present tenants in their

tenancy from rent increases or decreases, and increases the cost to incoming tenants by the amount of the "premium" paid by said tenant to the departing tenant for the right to occupy at a reduced rate?

3. Since the federal right or claim does not ripen until the state has denied just compensation, did the federal claim even exist at the time the state courts purported to dispose of it?

4. Does a federal "as applied" taking claim arise at the time of the passage of the rent control ordinance or sale of the coach for a premium, such that new federal claims, arising after completion of state court proceedings, are now ripe for decision by the federal district court?

LIST OF PARTIES

The caption of the case contains the names of all parties who are Petitioners in this Petition for Writ of Certiorari. The decision of the Court of Appeal for the Fourth Appellate District, reprinted in Appendix A to this Petition, lists all parties to the proceedings in the state appellate court in the caption of that decision.

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN K. YEE AND IRENE S. YEE, H.N. AND FRANCES C. BERGER FOUNDATION, MOUNTAIN SHADOWS MOBILE HOME ESTATES, RICHARD C. KUEBLER dba MOONGLOW MOBILE HOME PARK, CASA DE AMIGOS MOBILE HOME ESTATE, VISTA VERDE, LTD., IMPERIAL ESCONDIDO MOBILE ESTATES, and MILDRED D. TACEY,

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vs.

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ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

Petitioners, John K. Yee and Irene S. Yee, H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler dba Moonglow Mobile Home Park, Casa de Amigos Mobile

Home Estate, Vista Verde, Ltd., Imperial Escondido Mobile Estates, and Mildred D. Tacey pray that a writ of certiorari issue to review the decision and judgment of the Fourth Appellate District, Division One, Court of Appeals for the State of California, filed on October 31, 1990 in Yee v. City of Escondido, 4th Civ. App. D010307, consolidated on appeal with eleven other cases at the request of the Court, eight of those cases' plaintiffs are Petitioners herein.

OPINIONS BELOW

The decision of the Fourth Appellate District Court of Appeal for the State of California, Division One, whose judgment is herein sought to be reviewed, was issued on October 31, 1991, and became final on the issuance of the remittitur on February 4, 1991. The opinion is reported at 224 Cal.App.3d 1349, 274 Cal.Rptr. 551,

and a copy of the Court's decision is located at **Appendix A** to this Petition. A copy of the Order of the California Supreme Court denying the Petition for Review in this case appears in **Appendix B** to this Petition.

The California Supreme Court has also denied a Petition for Review in the case of Palomar Mobilehome Park Association v. City of Escondido, 4th Civ. No. D011484, an unpublished opinion of the State Court of Appeals of California for the Fourth Appellate District, which has the same effect and holding as the opinion in this case, and for which a Petition for Review is currently pending in this Court, Docket No. 90-1824.

The Superior Court of the State of California in and for the County of San Diego entered judgment dismissing plaintiff Yees' complaint on demurrer for

failure to state a cause of action on March 30, 1989, and a copy of the court's order appears in **Appendix C** to this petition. All of the other petitioners here were also dismissed on demurrer in the Superior Court for failure to state a cause of action.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The decision and judgment of the Fourth Appellate District, Division One, Court of Appeal for the State of California, was filed on October 31, 1991. That judgment and decision finally affirmed the orders of the Superior Court of San Diego County, California, entered individually in each of Petitioners' cases, dismissing plaintiffs' complaints on demurrer of the City of Escondido for failure to state a cause of action.

A timely consolidated petition for the discretionary review of the Supreme Court of the State of California was denied by Order on January 24, 1991.

On April 11, 1991, Ms. Justice Sandra Day O'Connor entered an order extending the time for the filing of this petition to and including May 24, 1991. On April 30, 1991, Ms. Justice Sandra Day O'Connor entered an order entered an order further extending the time for the filing of this petition to and including June 23, 1991.

CONSTITUTIONAL PROVISIONS

AND STATUTES INVOLVED

Fifth Amendment

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> No person shall . . . be deprived of. . . property, without due process of law; nor shall private property be

taken for public use, without just compensation.

California Constitution

The California Constitution, Article I, Sec. 19, provides:

> Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

Escondido Ordinance

The Escondido Municipal Code, Article V, §§ 29-101 through 29-108, codifies Proposition K, a voter initiative

establishing mobilehome park rent controls for mobilehome parks located within the City's jurisdiction. Section 29-103 provides, in pertinent part:

> Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986.. . .No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the Board [the mobilehome park rental review board of the City of Escondido].

Sections 29-107 and 29-108 of the Ordinance provide that a tenant may refuse to pay any rent in excess of the maximum rent permitted by Article V, and that any such "excess" rent is illegal, non-payment of which provides a defense to eviction

and will subject the "person who demands, accepts or retains any payment of rent in violation of this article" to treble damages plus attorneys' fees and costs, as well as a misdemeanor prosecution punishable by fine and/or confinement.

Section 29-106 of the City's Ordinance provides that "a tenancy which is not subject to the provisions of the mobilehome residency law shall not be terminated nor shall its renewal be refused, except for one or more of the following reasons:" and then sets forth those same protection from eviction for other than "good cause" as are set forth in the California Mobilehome Residency laws.

California Statutes

The California Mobilehome Residency Law (Cal. Civ. Code §§ 798 et seq.), specifically §§ 798.55, 798.56 & 798.74,

protect tenants from eviction from a mobilehome park and require the approval of a purchaser of a mobilehome that will remain in the park if the purchaser has the financial ability to pay the rent and does not have a prior tenancy history indicating he or she will not comply with the rules and regulations of the park. (Pertinent portions of Cal. Civ. Code §§ 798 et seq. are set forth in **Appendix D** to this Petition.)

STATEMENT OF CASE

This Petition seeks review of the California Fourth Appellate Court's opinion and judgment denying an unconstitutional taking of property results from vacancy control in mobilehome park rent control ordinances, in direct contravention to the federal law as established in both the Ninth and Third Circuits under Hall v. City of Santa

Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) and Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990).

PROCEDURAL BACKGROUND

AND HOW THE FEDERAL QUESTIONS AROSE

The Complaints

Plaintiff Yees filed suit in the San Diego Superior Court on December 1, 1988, challenging the City of Escondido's mobilehome rent control ordinance as applied to plaintiffs on the basis that the inability of the plaintiff parkowners to raise rents on a space at the time a mobilehome is sold in-place effects a taking of property which is specifically condemned in Hall v. City of Santa Barbara, supra, by allowing the outgoing tenant to sell along with his or her trailer the right to occupy the rent-

controlled space, for which a quantifiable premium is received by the outgoing tenant representing the value of the right to occupy and for which the landlord parkowner receives nothing.

Plaintiff Yees' complaint sought redress for the violation of its civil rights under 42 U.S.C. §§ 1983 et seq due to the alleged taking in violation of the Fifth and Fourteenth amendments to the U.S. Constitution, as well as just compensation under the California State Constitution, Article 1, Section 19. Plaintiffs sought declaratory and injunctive relief against further enforcement of the ordinance, and attorneys' fees under 42 U.S.C. § 1988 and Cal. Civ. Proc. § 1036. (Complaint, S.D.S.Ct. Case No. N 42268).

Petitioners H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home

Estates, Richard C. Kuebler dba Moonglow Mobile Home Park, Casa de Amigos Mobile Home Estate, Vista Verde, Ltd., Imperial Escondido Mobile Estates, and Mildred D. Tacey filed complaints subsequent to the Yees which were identical in all respects, except that they alleged a taking had occurred for which compensation was due under Article 1, Section 19 of the California Constitution without reference to the federal constitution.

The Demurrers

The City filed a Demurrer and Motion to Strike, arguing that Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, (1988) was not binding on the California state courts, and that precedence established by facial attacks to rent control per se provided authority under California law for the dismissal of plaintiffs'

complaint. (City's Memorandum of Points & Authorities in Support of Demurrer, Case No. N 42268, filed on January 3, 1989).

Plaintiffs' Opposition

Plaintiffs opposed the demurrer, arguing that as in Hall v. City of Santa Barbara, supra, this was an as applied attack and Hall constituted the entire published case law on point to this litigation and was, thus, controlling, and that the City's ordinance, superimposed upon the preexisting California Mobilehome Residency law, effected a taking in the same way as did the ordinance found unconstitutional in Hall.

Plaintiffs argued that by allowing the departing tenant to sell the right to occupy the rent-controlled space, a taking occurred under both the California Constitution and the Fifth and Fourteenth amendments to the U.S. Constitution, for

which redress under 42 U.S.C. § 1983 et seq. was available.

Plaintiffs further explained that they were not asserting that all rent control ordinances, or even all mobilehome rent control ordinances were unconstitutional, but that their complaint was specifically addressed to the "vacancy control" provisions of the Escondido ordinance because the inability of the landlord to raise rental rates at the time of sale or transfer for consideration resulted in the outgoing tenants' ability to sell the possessory property right, out of which sale, the landlord property owner receives nothing.

Plaintiffs further argued that the inability to raise rents at the time of sale does not substantially advance the legitimate governmental interest in preserving low cost housing opportunities

because the incoming tenant pays more due to the premium received by the outgoing tenant than would be paid if the landlord were allowed to raise rents to market levels, the ordinance effects a taking under Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987). (Points and Authorities in Opposition to Demurrer, Case No. 42268, filed January 18, 1989).

The oppositions in the other Petitioners' cases took the same form, with Petitioners' arguing that an uncompensated taking occurred due to vacancy control which was prohibited under both the California Constitution and the Fifth and Fourteenth amendments to the U.S. Constitution.

The Ruling on Demurrer

The Superior Court ruled for the defendant City granting both the Motion to

Strike and the demurrers without leave to amend and dismissing the case on its own motion. The Court's Order was entered by signature of the Judge on March 30, 1989. Notice of Signing of Order was served to plaintiffs on April 4, 1989, and filed on April 5, 1989.

The Appeal

Plaintiffs timely appealed their dismissals to the Fourth Appellate District Court of Appeals for the State of California, Division One. On appeal, plaintiffs argued that the effect of the City of Escondido's mobilehome park rent control ordinance with vacancy control was an unconstitutional taking under both the California Constitution and the Fifth and Fourteenth amendments to the U.S. Constitution and that this taking due to vacancy control was recognized and condemned as a physical occupation taking

of property requiring compensation both in Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988) and in the more recent case of Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990)[1].

Plaintiffs argued that the federal cases constituted the controlling law as it was the only law on point to this litigation and noted that the Central District had followed Hall, supra, in Azul Pacifico v. City of Los Angeles, (C.D.Cal. Case No. CV 87-2287-LEW) in rendering judgment for plaintiff and invalidating

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[1] The Appellate Court was notified of the Pinewood decision in Appellants' Supplemental Brief filed on May 21, 1990 (pursuant to the Court's order granting Appellant's Motion to file Supplemental brief) in the consolidated case No. D010769, which was subsequently consolidated with the Yee case No. D010307.

the Los Angeles mobilehome park rent ordinance because it did not provide for vacancy decontrol and thus effected an unconstitutional taking of property without compensation (that decision is now published as Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. (C.D.Cal. 1990)).

Appellant further argued that the ordinance violates the due process clause of the fourteenth amendment because it does not substantially advance legitimate state interests, while effecting a physical taking of property, and was, thus, an irrational exercise of the City's police powers. (Appellant's Opening Brief, filed October 2, 1989).

The City argued that the Hall case is against the weight of authority, rendered by a Ninth Circuit panel that was "confused" and "lost in their own

rhetoric". (Respondent's Brief, filed on or about November 14, 1989, pp. 9 - 10). The City further argued that subsequent cases decided by the U.S. Supreme Court undermined the Hall, supra, rationale. (Respondent's Brief, pp. 11 - 12).

The City argued that Hall v. City of Santa Barbara, supra, was not binding on the state courts, and that Azul Pacifico, supra, was merely a decision in which the Court was bound to follow Hall, supra. The City argued, as well, that this issue had been previously decided by the Fourth Appellate Court in Oceanside Mobilehome Park Owners Assn. v. City of Oceanside, 157 Cal.App.3d 887, 204 Cal.Rptr. 239 (1984). (Respondent's Brief, pp. 14-16)

Appellant argued in Reply that, contrary to Respondent's assertions, there was no case law contrary to Hall, supra, Pinewood, supra, and Azul Pacifico, supra,

as no other case addressed the issues in this litigation. Appellant explained the cases cited by the City were all distinguished from the present litigation in material ways which compelled the following of the federal cases which had specifically found vacancy control provisions of mobilehome park rent control ordinances effected a taking requiring compensation.

Appellant further argued whether an ordinance is rational is a factual matter, improperly disposed of at the pleading stage. (Appellant's Reply Brief, filed December 1, 1989)

THE STATE COURT OF APPEALS DECISION, INCONSISTENT WITH RULING FEDERAL APPELLATE DECISIONS, THAT THE FORCED TRANSFER OF THE "PREMIUM VALUE," WHICH PREMIUM REPRESENTS THE RIGHT TO OCCUPY THE SPACE AT A REDUCED RENT, FROM LANDLORD TO TENANT, DOES NOT CONSTITUTE A TAKING IS ERROR.

The Ruling on Appeal

The Fourth Appellate court issued its ruling on October 31, 1990, affirming the trial court's dismissal.

The Court below, after stating "No one can dispute that Escondido's Rent Control Ordinance, like the Ordinance in Oceanside, effects a transfer of value from landlords to tenants." (Opinion, Appendix A, pp. 13 - 14), rejected the Hall reasoning (Opinion, Appendix A, pp. 15 - 28), as well as the Court of Appeal's decision in Pinewood Estates (Opinion,

Appendix A, p. 19) for two fundamental reasons:

(1) The Court's generalized understanding of economics (Opinion, Appendix A, pp. 8 - 9), and

(2) its alleged prior holding in the case of Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside, 157 Cal.App.3d 887, 204 Cal.Rptr. 239 (1984).

Huffman, J. dissenting, correctly noted:

> The difficulty, however, with this position [that the Fourth Appellate District had taken a contrary position to that advanced in Hall in the Oceanside case] is that although the Oceanside opinion discussed a multitude of issues having to do with the Oceanside Ordinance dealing with rent control in mobilehome parks, it did not

> really address the issue now before us.

(Opinion, Appendix A, Dissent, p. 35).

The Court below also sought to distinguish the holding in Pinewood Estates, supra, by criticizing the failure of the Third Circuit to discuss or cite F.C.C. v. Florida Power, 480 U.S. 245 (1987). (Opinion, Appendix A, p. 19, ftn. 10).

In ruling on appellant's claim, the Fourth Appellate Court used the standard applicable to facial attacks to rent controls per se, rather than the standard proper for an as applied attack to a regulation that effects a physical occupation taking of property. In ruling against appellant, the Court said:

> The critical question is whether such transfer can be justified by a rational governmental purpose, i.e.

are the controlled rents fair and reasonable. In Oceanside we were forced to deal with this important question and concluded the ordinance there was rationally based. Here, plaintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents. Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a "fair" rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no "taking". The fact that used mobilehomes in Escondido are selling for more than they have in the past is irrelevant.

(Opinion, Appendix A, p. 14).

In its determination that plaintiffs had not stated a cognizable taking claim, the Fourth Appellate Court was adjudicating plaintiffs' claims under the Fifth (and Fourteenth) amendments to the U.S. Constitution as well as under the California Constitution. (Opinion, Appendix A, p. 6). However, in so ruling, the California Court specifically declined to follow the federal cases of Hall, supra, and Pinewood Estates, supra.

The Federal Cases

Plaintiff Yees filed an action in the U.S. District Court for the Southern District of California on February 14, 1989 (S.D.Cal. No. 890234 B (CM)). In that Complaint, plaintiff Yees sought damages for the taking due to vacancy control under 42 U.S.C. §§ 1983 et seq., alleging a taking in violation of the Fifth and

Fourteenth amendments to the U.S. Constitution.

In ¶ 8 of the federal Complaint, plaintiffs specifically alleged that suit had been filed in the state court to comply with the requirement that plaintiffs exhaust state remedies under Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985), and that suit had been dismissed on February 10, 1989.

The California courts were well-aware of the federal Complaint filed by plaintiff Yees, and made reference to the Yees returning to federal court in footnote 1 of the published Yee decision. (See Appendix A, p. 4).

On June 23, 1989, pursuant to Motion to Abstain by the City, the Southern District Court ordered the case stayed "pending the exhaustion of all state

remedies, including appeal". (A copy of the court's order staying the case appears in **Appendix E** to this petition.)

On January 31, 1991, after the order of the California Supreme Court issued denying the Petition for Review in this case, Plaintiffs filed a Motion for an Order Lifting the Stay in the federal case.

The court initially ordered the Stay lifted (on March 22, 1991) saying:

Plaintiff's Motion for Order Lifting Stay is granted. When the California Supreme Court denied Plaintiffs' petition for review of the Court of Appeal's decision in Yee v. City of Escondido, 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990), Plaintiffs were allegedly denied just compensation for the alleged Fifth Amendment "taking." The court finds

that Plaintiffs have thus exhausted their state court remedies as required by Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985)."

(Appendix F, p. 2).

The City then filed a Motion to Reconsider and a Motion to Dismiss on the grounds that plaintiffs' federal case was barred by the doctrine of res judicata and the preclusive effect of the state court lawsuit on the federal suit. The Court reconsidered and determined, by Order entered on June 12, 1991, that plaintiffs had fully litigated their federal claims in the state courts and dismissed the federal case saying, inter alia:

> The federal district courts are courts of original, and not appellate, jurisdiction. Thus, the proper forum for review of the judgment in Yee v.

City of Escondido is the United States Supreme Court, and not the United States District Court. . . .

> The Court is aware that the interplay between Williamson - which requires exhaustion of state court procedures for a federal taking claim to ripen - and the doctrine of res judicata have placed Plaintiffs in a curious, and frustrating position. By satisfying the exhaustion requirement and litigating the federal claim in state court, Plaintiffs are now barred from litigating the federal claim in federal court. However, the court is unaware of any applicable exception to res judicata which would allow this court to relitigate the federal constitutional issue."

(See Appendix G to this Petition.)

Petitioners H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler dba Moonglow Mobile Home Park, Casa de Amigos Mobile Home Estate, Vista Verde, Ltd., and Mildred D. Tacey filed federal Complaints on February 1, 1991. All of these Petitioners' federal complaints were dismissed on the same res judicata grounds, even though their state complaints had not alleged any federal claims.

Plaintiffs contend that if this Court does not grant review in this case, the federal courts should be ordered to take jurisdiction of the federal cases.

The Federal Claim Did Not Even Exist At the Time the State Court Purported To Dispose of it

(a) Elements of a Cause of Action For Fifth Amendment Taking Claim.

The court in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985) set forth the elements of a taking claim under the Fifth amendment as follows:

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.. . .If the government has provided an adequate process for taking compensation and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking.. . .Similarly, if a State provides an adequate procedure

for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation. . . .Thus, the state's action is not "complete" in the sense of causing the constitutional injury "unless or until the state fails to provide an adequate post deprivation remedy for the property loss".

Williamson Planning Comm., supra, 473 U.S. at 194-195, (internal citations omitted).

There are, thus, at least two elements to a taking claim under the Fifth amendment: (1) a taking, and (2) a failure of post deprivation remedies to provide just compensation.

The second element for a taking under federal law is that the State by its conduct establish that adequate

compensation will not be provided. That element can only be satisfied by utilizing state procedures, completing them without success, and then, and only then, is there a federal right under the Fifth Amendment. It is at that time of completion that plaintiffs' federal claims arise.

Sinaloa Lake Owners Association v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), cert. den. __ U.S. __, 110 S.Ct. 1317 (1990) speaks to exactly the same point:

> So long as the state provides "an adequate process for obtaining compensation," no constitutional violation can occur until the state denies just compensation.

Sinaloa, supra, 882 F.2d at 1402, (emphasis added).

Since the state courts of California have failed to provide just compensation,

the federal claim ripens only after state court action is complete and thus, the purported ruling on the federal claim is an act without any effect since the federal claim did not exist until and after the state court proceedings on the matter had come to an end.

(b) This is a Continuing Wrong, Each New Sale of a Coach Creates a New Cause of Action, and the Federal Claim is Now Ripe for Adjudication.

It is indisputable that a cause of action arises on each sale of a coach. Since a cause of action under Hall does not exist until there has been the monetization of the right to occupy the space at a reduced rent by the departing tenant (i.e., the tenant receives a premium due to rent control), unless and until the premium has been received, no cause of action may be maintained.

Two examples illustrate the point:

(a) Suppose an ordinance is passed, and, thereafter, for a period of five years a coach is not sold. No cause of action exists under Hall, there has been no prohibited transfer of the premium value of the coach, and the cause of action will arise, if at all, at the time of the sale of the coach.

(b) Suppose after a statute is passed, real property values decline for a period of five years, and the departing tenant receives no premium value for the coach upon sale. Again, under Hall, there would be no cause of action upon which a lawsuit can be maintained.

The application of defendant's ordinance to plaintiffs' private property effects a taking without just compensation. It is a continuing wrong. The question of when a claim accrues is

determined by federal law. McCune v. City of Grand Rapids, 842 F.2d 903, 905 (6th Cir. 1988); Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984); Storey v. U.S., 629 F.Supp. 1174, 1177 (ND Miss. 1986).

The continuing wrong applies in federal court:

> Where a continuous chain of events or course of conduct is involved the cause of action accrues at the time of the final act in a series of event or course of conduct.

Barbaccia v. County of Santa Clara, 451 F.Supp. 260, 266 (ND Cal. 1978).

The continuing wrong doctrine also applies to civil rights violations and taking claims which are made in federal court. Front Royal and Warren Industrial Parks v. Front Royal, 708 F.Supp. 1477 (WD Va. 1989). The Front Royal court rules that a city's refusal to connect sewers to

a property was a continuing wrong and that the statute of limitations did not begin running on the date that sewers were scheduled to be installed.

> This court has previously considered the statute of limitations defense offered by defendants and has found that, since there was a continuing wrong, plaintiffs' action [for inverse condemnation and civil rights violation] are not time barred.

(708 F.Supp. at 1487).

Similarly in Lockary v. Kayfetz, 587 F.Supp. 631, 635 (N.D. Cal. 1984), the district court applied the continuing wrong doctrine to a taking claim on the grounds that the implementation and enforcement of a water moratorium was a continuing wrong.[2]

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[2] The California Supreme Court applied a continuing wrong doctrine to an action brought by neighboring homeowners

The source of an entire claim needs to be analyzed to determine if a wrong is continuing:

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for inverse condemnation and nuisance against a public entity operating an airport in Baker v. Burbank-Glendale-Pasadena Airport Authority, 39 Cal.3d 862, 705 P.2d 866 (1985). The Baker court discussed the difference between permanent and continuing nuisances:

> On the one hand, permanent nuisances are of a type where 'by one act a permanent injury is done, [and] damages are assessed once for all.' . . . Damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence.
>
> On the other hand, if a nuisance is a use which may be discontinued at any time, it is considered continuing in character and persons harmed by it may bring successive actions for damages until the nuisance is abated. 39 Cal.3d 862 at 868-869.

The Baker court went on to discuss the importance of plaintiff's election to treat the nuisance as permanent or continuing:

> In case of doubt as to the permanency of the injury the plaintiff may elect whether to treat a particular nuisance as permanent or continuing. The importance of the plaintiff's election has long been recognized. 39 Cal.3d at 870.

We are not now called upon to decide whether in a situation like this (recovery of inverse condemnation damages after the government flooded land) a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him - for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim . . . is not a single event; it is continuous and as there

> is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized.

United States v. Dickinson, 331 U.S. 745, 749 (1946).

A variation on the continuing wrong doctrine is found in Gordon v. City of Warren, 579 F.2d 386 (7th Cir. 1978). In Gordon the court ruled that the statute of limitations for damages under 42 U.S.C. § 1983 did not even begin to run until the ordinance at issue was declared invalid. The district court had applied a three-year statute of limitations running from the date of enactment and rejected application of the continuing wrong doctrine. The Court of Appeal reversed setting the date of the accrual of the

right to seek damages as the date on which the court ruled the ordinance invalid.

Here, the request to declare the ordinance invalid is made in the same action as the damage claim. Application of a rule of accrual which would run from the date of declaration of invalidity is a variant on the continuing wrong doctrine. The plaintiffs meet either characterization of the rule. The right of action claimed by the plaintiffs to recover damages accrued within the time permitted in the statute of limitations.

Another manner in which to determine if a wrong is a continuing wrong is to look at how a remedy can be fashioned. If the plaintiffs could sue for all damages and recover them in one action, the wrong would not be continuing. (See Korgel v. U.S., 619 F.2d 16 (8th Cir. 1980)).

It has been held that the enactment of an ordinance alone does not give rise to a cause of action. It is the resulting damage under the ordinance that gives rise to a claim. (Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 293-297 (1981); Pennell v. City of San Jose, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d (1988)).

Recovery is only available to plaintiffs as to coaches which have sold. Mobilehome coaches which have not sold have not resulted in a transfer of the unconstitutionally taken rights as the party owning the coach has only benefitted from the constitutional portions of the City's rent control scheme.

It is only when the mobilehome coach owner sells that the authority of the unconstitutional portions of the rent control scheme are invoked. It is only

when the mobilehome coach sells that damage arises. It is an essential corollary that a separate damage arises each time a coach is sold. Since the plaintiffs cannot recover in one action for the damages from coaches that have not yet sold, plaintiffs would require successive actions for damages. The need for successive actions is a hallmark of a continuing wrong.

Where the damages resulting from an act are continuing or recurring so that they cannot at present be ascertained or estimated to bring in a single action, then separate and successive actions may be brought to recover damages as they occur. In those cases, the action accrues for purposes of the limitation period from the date of each injury and the plaintiff is not barred for a recovery

for such damages as have accrued within this statutory period before the filing of the action.

Piccolini v. Simon's Wrecking, 686 F.Supp. 1063, 1076-1077 (MD Pa. 1988).

The Petition for Review to the California Supreme Court

A Petition for (the discretionary) Review to the California Supreme Court was timely filed by plaintiffs/ appellants/ petitioners. Petitioners argued that the California Supreme Court should take the case for review as the decision rendered in the Fourth Appellate District, Division One, was directly in contravention to federal case law established by the Hall, Pinewood Estates, and Azul Pacifico cases (cited supra). However, the California Supreme Court entered an order denying the Petition on January 24, 1991.

WHY THIS WRIT SHOULD BE GRANTED

Special and important reasons exist for the granting of this Petition for Review as identified in Supreme Court Rule 10. The important questions of federal law presented here have never been ruled upon by this Court.

As specifically enunciated in Supreme Court Rule 10 (b), review may be granted:

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of a U.S. court of appeals.

In Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), the Ninth Circuit Court found the Santa Barbara mobilehome rent control ordinance, identical in legal effect to the ordinance in Escondido, effected an

unconstitutional taking without compensation.

In Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990), the Third Circuit found that vacancy control provisions of the Barnegat mobilehome park rent control ordinance in conjunction with state law (similar to the California Mobilehome Residency laws) effected a physical occupation taking without compensation in violation of the Fifth and Fourteenth amendments to the U.S. Constitution.

The state courts here specifically denied the viability of the Hall, supra, and Pinewood, supra, cases, and, concluding that they were not bound to follow them, determined that plaintiffs could not state a cause of action under either the California Constitution or the federal Constitution.

Petitioners contend the California state courts erred in determining federal rights under the Fifth and Fourteenth amendments in contravention of the entire published federal case law on point. In essence, by refusing to accept the precedents established in Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1987) cert. denied 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), Pinewood Estates of Michigan v. Barnegat Township, 898 F.2d 347 (3rd Cir. 1990), and further explained in Azul Pacifico, Inc. v. City of Los Angeles, 740 F.Supp. (C.D.Cal. 1990), while determining that plaintiff petitioners had failed to state a cognizable taking claim, the California Fourth Appellate court, Division One, has effectively overruled the decisions of two unanimous federal appeals courts.

Such flagrant disregard for federal law cannot be tolerated. This Supreme Court should grant this Petition for Review to protect this and similar plaintiffs from having their constitutional rights extinguished by state courts who fail to follow federal court precedence on issues of federal law.

IN CONCLUSION

Petitioners request this court to grant their petition for review or in the alternative to remand to the lower court with instructions to limit its decision to state constitutional issues or to follow federal law when ruling on federal constitutional issues. A third alternative is for this Court to order the federal courts to take jurisdiction of petitioners' claims.

Respectfully submitted,

LAW OFFICES OF JAGIELLO & PECH

By _____
ROBERT J. JAGIELLO
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John K. Yee and Irene S. Yee, H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler dba Moonglow Mobile Home Park, Casa de Amigos Mobile Home Estate, Vista Verde, Ltd., and Mildred D. Tacey

APPENDIX A

APPENDIX A

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN K. YEE, et al.,	)	
	)	
Plaintiffs and Appellants,	)	D010307
	)	
v.	)	Super.
	)	Ct. No.
CITY OF ESCONDIDO, a Municipal Corporation,	)	N42268
	)	
	)	
Defendant and Respondent.	)	
	)	

[And eleven other cases.]*

FILED October 31, 1990

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* H.N and Frances C. Berger Foundation v. City of Escondido, D010796; Mountain Shadows Mobile HOme Estates v. City of Escondido, D010805; Richard C. Kuebler dba Moonglow Mobilehome Park v. City of Escondido, D010942; Casa De Amigos Mobile Home Estates v. City of Escondido, D010972; Vista Verde Limited v. City of Escondido, D011011; Escondido Mobileparks West v. City of Escondido, D011027; Robert Dolley, et al. v. City of Escondido, D011028; Glen Charles De Jong, et al. v. City of Escondido, D011029; Del Dios Mobile Home Estates v. City of Escondido, D011030; Imperial Escondido Mobile Estates v. City of Escondido, D011046; and Mildred D. Tacey v. City of Escondido, D011115.

APPEAL from a judgment of the Superior Court of San Diego County, Don Martinson, Judge. Affirmed.

Robert J. Jagiello, Debra K. Butler and Jagiello & Pech for Plaintiffs and Appellants.

David R. Chapman and Jeffrey R. Epp, City Attorneys, Donald R. Lincoln, Linda B. Reich and Endeman, Lincoln, Turek & Heater for Defendant and Respondent.

Plaintiffs in these consolidated cases are all owners of mobilehome parks in Escondido. They ask us to revisit an issue of federal constitutional law we first considered several years ago in Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside (1984) 157 Cal.App.3d 887. In that case we rejected an argument made by an association of park owners that rent control ordinance constituted a compensable "taking" because tenants were

able to realize a premium on the sale of their mobilehomes in a rent controlled park compared with the price similar homes sold for in a non-rent control setting. Plaintiffs urge we reconsider our views relying on a more recent opinion from the Ninth Circuit Court of Appeals, which, based on an admittedly lengthier analysis, accepted such an argument. (See Hall v. City of Santa Barbara 99th Cir. 1986) 833 F.2d 1270.)

While federal circuit court precedent on issues of federal law is certainly entitled to substantial deference, it is not binding. (Rohr Aircraft Corp. v. County of San Diego (1959) 51 Cal.2d 759, 764; see 9 Witkin, Cal. Procedure (3rd ed. 1985) Appeal, § 780, p. 751.) We have reviewed the issue anew in light of Hall. Putting aside the practical effect of our

decision[1], we find Hall's reasoning unpersuasive and reaffirm the conclusion we reached in Oceanside.

FACTUAL AND PROCEDURAL BACKGROUND

In June 1988, voters in the City of Escondido passed an initiative measure which enacted a mobilehome rent control ordinance. Generally, the ordinance provided for a rollback of rents for mobilehome spaces to those existing on January 1, 1986. Park owners can seek adjustments in this base rent by filing an

[1] The Yees have filed a parallel action in federal court which was stayed by the district court judge pending exhaustion of all state court remedies. Assuming the California Supreme Court does not grant review, the Yees will then be able to return to federal court where the district court judge may feel compelled to follow Hall and grant the Yees the relief they seek. On the other hand, as we later explain (post, p. _), we think at least one United States Supreme Court decision which post-dates Hall demonstrates that Hall's analysis constitutes an interpretive misstep.

application with the City's Mobilehome Park Rental Review Board.[2]

Escondido's rent control ordinance does not exist in a vacuum. The relationship between landlords and tenants in mobilehome parks is extensively regulated by the California Mobilehome Residency Law. (Civ. Code, § 798 et seq.) Under its terms, a tenancy may not be terminated except for several specified reasons constituting good cause. (§ 798.56). In addition, a park owner is compelled to accept as a new tenant a person who purchases a mobilehome from an existing tenant unless the new tenant does not have the financial ability to pay rent or, based on past tenancies, has

[2] The members of the Escondido City Council serve as the Mobilehome Park Rental Review Board.

demonstrated he or she will not comply with the park rules and regulations. (§ 798.74.)

It is the combined effect of the Escondido rent control ordinance and the California Mobilehome Residence Law which plaintiffs contend amounts to a compensable "taking" within the meaning of the Fifth Amendment to the United States Constitution and article I, section 19 of the California Constitution. They note that state law compels the park owner -- except in limited circumstances -- to accept the purchaser of an existing tenant's mobilehome as a new tenant. As a result, plaintiffs argue, the price of used motorhomes in Escondido has increased dramatically since passage of the rent control ordinance due entirely to the fact that existing tenants are able to monetize the value to mobilehome owners living in a

rent controlled jurisdiction. According to plaintiffs, Escondido's rent control ordinance constitutes a "taking" because it transfers this monetary interest from park owners -- who would normally capture the value through increased rents -- to tenants.

Plaintiffs never sought an adjustment in the base rent to be charged in the mobilehome parks they own under the terms of the Escondido ordinance. Instead, they filed this lawsuit challenging the constitutionality of the ordinance on its face and seeking compensation for the interest which they allege has been "taken". In each case, the court sustained the City's demurrer to the complaint without leave to amend and dismissed the action.

DISCUSSION

A

Mobilehomes and mobilehome park spaces are what economists refer to as complementary goods. Because they are used together, there is a direct and necessarily inverse relationship between the prices for complementary goods. For example, a decrease in the price of popcorn will cause an increase in the demand for popcorn poppers. Assuming a constant supply, this in turn will result in an increase in the price of popcorn poppers. The "complementary good" effect is basic to a free market economy. (See, e.g., Reynolds, Microeconomics; Analysis and Policy (5th ed. 1985) p. 41; McConnell, Economics: Principles, Problems, and Policies (10th ed. 1987) p. 55.)

It is thus inevitable that where government acts to reduce (or at least limited increases in) the rental prices charged for mobilehome spaces, the price of mobilehomes will increase. This is particularly true where, as in California, other statutes generally compel a park owner to accept the purchaser of an existing tenant's mobilehome as a new tenant. This assures that the complementary good effect will be substantially limited to those mobilehomes currently occupying rent-controlled spaces.

Recognizing that "the function of government may often be to tamper with free markets, correcting their failures and aiding their victims" (Fisher v. Berkeley (1986) 475 U.S. 260, 264), decisions of the United States and California Supreme Courts have established

that local governments may, consistent with the police power, adopt rent control ordinances where imperfections in the unregulated market for rental housing allow landlords to charge excessive rents. (See, e.g., Pennell v. San Jose (1988) 485 U.S. 1, 11-12.) The U.S. Supreme Court has repeatedly reaffirmed that rent control ordinances are not per se takings for the purposes of the Fifth Amendment's requirement of due compensation. (Id. at p. 12, fn. 6; FCC v. Florida Power Corp. (1987) 480 U.S. 245, 252; Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 440.) The California Supreme Court has explained that rent control ordinances "are within the police power if they are reasonably calculated to eliminate excessive rents and at the same time provide landlords with a just and reasonable return on their property.

However, if it is apparent from the face of the provisions that their effect will necessarily be to lower rents more than could reasonably be considered to be required for the measure's stated purpose, they are unconstitutionally confiscatory." (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 165; accord Permian Basin Area Rate Cases (1968) 390 U.S. 747, 769-770.)

Where the price charged for a good or service is excessively high due to monopoly or other unfair conditions, it necessarily follows that the price for complementary goods and services will be artificially low. Where a government regulation purports to reduce the excessive and unfair price to a reasonable level, the mere fact that the price for complementary goods and services rises as a result does not transmute an otherwise

reasonable price regulation into a compensable "taking".[3]

This was the rationale underlying our succinct conclusions in the Oceanside case. In describing the plaintiffs' contentions, we quoted from an amicus brief:

> "'[W]here rents are reduced more than required for the purposes of the police power, an artificially reduced rent ceiling results, which constitutes a valuable interest to the existing tenant which may be sold to a buyer of the mobilehome under the requirements of State law. The combined effect of the Mobilehome Residency Law (Civ. Code, § 798 et seq.) and the Ordinance assures this result.' Thus, amicus argues, a park owner is bound to accept a selling tenant's assignment of an existing lease [citation], nd a selling tenant with a favorable rent-controlled lease may be able to sell the onsite mobilehome for a higher price than can be obtained for the identical mobilehome situated in an unregulated park of identical quality where higher rents are being charged." (157 Cal.App.3d at pp. 906-907.)

We then answered the contention:

> "The amicus' initial premise is flawed. The ordinance is structured to establish a fair base rent which reflects general market conditions and incorporates relevant pricing factors. Rents will not be 'reduced more than required for the purposes of the police powers.': (Id. at p. 907.)

No one can dispute that Escondido's rent control ordinance, like the ordinance

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[3] One might argue that monopolistic effects have caused the price of used motorhomes to be artificially high and as a result, such prices should be regulated as well. Even if this were true, however, it is an issue between mobilehome buyers and sellers. It does not suggest that governmental regulation of excessive rents has "taken" anything from landlords.

in Oceanside, effects a transfer of value from landlords to tenants. The critical question is whether such a transfer can be justified by a rational governmental purpose, i.e., are the controlled rents fair and reasonable. In Oceanside we were forced to deal with this important question and concluded the ordinance there was rationally based. Here, plaintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents. Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a "fair" rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no "taking". The fact that used mobilehomes in Escondido are selling for more than they have in the past is irrelevant.

B

Instead of addressing the fundamental question, plaintiffs place principal emphasis on the Ninth Circuit's Hall opinion. (833 F.2d 1270.) Hall relies extensively on the U.S. Supreme Court's decision in Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. 419. Loretto dealt with a New York law which required residential landlords to permit cable television companies to attach cables to their buildings. The court created an exception to the traditional multifactor balancing approach applicable to most governmental regulations which are alleged to constitute takings. The Court explained that where the governmental action "is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the

action achieves an important public benefit or has only minimal economic impact on the owner." (Id. at pp. 434-435.) Characterizing this holding as "very narrow" (Id. at p. 441). the Court emphasized that "[s]o long as [government] regulations do not require the landlord to suffer the physical occupation of a portion of building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." (Id. at p. 440).

Implicitly conceding that the Santa Barbara mobilehome rent control ordinance would not constitute a taking under a traditional multifactor inquiry, Hall attempts to argue that the effect of the ordinance is to grant tenants the right to permanently occupy the landlord's property at a reduced rent. The opinion thus

suggests that the allegations of plaintiffs' complaint fit within the narrow Loretto exception and constitute a per se taking.[4] Hall, however, does not discuss or even cite our prior decision in Oceanside. It dismisses the contrary implications of other substantial precedent by noting that "[i]n none of the cited cases have the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferable to others, that it had a market value,

[4] Other than Loretto, Hall places primary reliance on Justice Rehnquist's solitary dissent to the Court's dismissal in Fresh Pond Shopping Center, Inv. v. Callahan (1983) 464 U.S. 875 for want of a substantial federal question. Hall explains, "We do interpret the Fresh Pond dismissal as repudiating everything said by Justice Rehnquist in his dissent." (833 F.2d at p. 1276, fn. 14.) There being no opinion of the court in the case of a dismissal, we have some difficulty understanding on what basis the Hall panel can distinguish those portions of dissent which can be relied upon from those which cannot.

that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." (833 F.2d at p. 1278.)

Hall is an unfortunate corollary to the danger Justice Blackmun foresaw when, in dissenting in Loretto, he lamented "the prospect of distinguishing the inevitable flow of certiorari petitions attempting to shoehorn insubstantial takings into [Loretto's] 'set formula.'" (458 U.S. at p. 451.)[5] If mobilehome park tenants in Santa Barbara or Escondido possess any rights to "permanently occupy" the landlord's property, those rights derive

[5] Even commentators sympathetic to Hall's result have implicitly criticized its analysis, warning against "stretching doctrine to conclude that government has 'physically occupied' property . . ." (Hirsch & Hirsch, Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol (1988) 35 UCLA L.Rev. 399, 466.)

not from a rent control ordinance but from the state Mobilehome Residency Law which limits the circumstances under which a landlord may terminate a tenancy, imposing a "good cause" standard. No case we are aware of has remotely suggested that such a regulation of the landlord-tenant relationship constitutes a compensable taking within the meaning of Loretto.

Moreover, Hall failed to explain why the existing tenant's ability to "monetize" the future rent control savings and recapture it from later tenants when the mobilehome is sold is somehow critical to the takings analysis.[6] (See Manheim, Tenant Eviction Protection and the Takings Clause (1989) 1989 Wis. L.Rev. 925, 969,

[6] Pinewood Estates v. Barnegat Tp. Leveling Bd. (3rd Cir. 1990) 898 F.2d 347, which follows Hall, suffers from a similar defect.

fn. 237.)[7] If an owner's property has been taken by the government, it should be of no constitutional consequence to whom the property has been given. Compare, for instance, a residential rent control ordinance which does not allow rent increases simply because the tenant vacates the rental unit. Similar

[7] Commenting on Hall in light of the history of Supreme Court takings jurisprudence, Professor Manheim observes that Ninth Circuit's approach, "finding a taking of a quantifiable 'monetized' interest in a mobile home's placement value, is essentially that of Justice Holmes' repudiated model" in Pennsylvania coal co. v. Mahon (1922) 260 U.S. 393. (Manheim, op. cit. supra, at p. 968.) "Indeed," concludes Manheim citing Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, 130, "the Court has squarely rejected Justice Holmes' model of dividing single parcels into discrete estates, favoring instead Justice Brandeis' approach of looking at a law's impact on overall property value, . . . Under the modern unitary approach, the net economic impact of the state [mobilehome residency] law, even when combined with local rent control, would be insufficient to cause a regulatory taking." (Id. at pp. 967-968, fns. omitted.)

ordinances have repeatedly withstood challenges alleging facial unconstitutionality. (See, e.g., Fisher v. City of Berkeley (1984) 73 Cal.3d 644, app. dism. 471 U.S. 1124; Hutton Park Gardens v. Town Council (N.J. 1975) 350 A.2d 1.) In such a case, the economic benefit of the ordinance is spread among all succeeding tenants. In this case, of course, plaintiffs and the Hall court would assert that the benefit of the ordinance is limited to those mobilehome tenants renting spaces at the time the ordinance is enacted. In both cases, however, the value "taken" from the property owner is conceptually identical.[8]

[8] It may be that what really underlies the Hall result is the court's doubt that mobilehome rent control rationally furthers a legitimate governmental purpose. (See 833 F.2d at pp. 1280-1281.) This same concern has been voiced by a set of sympathetic

Beyond its "monetization" argument, Hall merely identifies the necessary relationship between the prices charged for complementary goods and services -- in this case the mobilehome and the mobilehome rental space -- and uses it as facile but irrelevant justification for the conclusion that a taking has occurred. Put more simply, if the rents charged by park owners before rent control were

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commentators who question whether rent control does anything to alleviate the shortage of available mobilehomes or lessen the total economic burden on mobilehome park tenants. (Hirsch & Hirsch, supra, 35 UCLA L.Rev. at pp. 461-463.) While portions of the Supreme Court's takings jurisprudence have their origins in notions of substantive due process, Hall's resurrection of a Lochner-type analysis (see Lochner v. New York (1905) 198 U.S. 45) has been criticized as inconsistent with the modern Court's deferential view of the nexus between legitimate governmental purposes and chosen legislative means. (Manheim, op. cit. supra, 1989 Wis. L.Rev. at p. 938, fn. 86, 948-950; Hall, supra, 833 F.2d at p. 1284. (Schroeder, J. dis. from den. of rhg. en banc).)

excessive, the market price for used mobilehomes were artificially and perhaps unfairly low. (But see ante, fn. _.) When government acts to restore fair rents by imposing rent control, the fact that the price of used mobilehomes rises has not unreasonably "taken" anything from the landlord, but alone caused a "permanent physical occupation" of the landlord's property.[9]

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[9] Hall and commentators of a like view assume that the uncontrolled rent for a mobilehome space is its "fair" rental value. (See Hall, supra, 833 F.2d at p. 1276 (Tenants pay "only a fraction of what it is worth in rent . . ."); Hirsch & Hirsch, op. cit. supra, 35 UCLA L.Rev. at p. 427 ("[W]e assume that a pad's fair rental value is the market rental of a similar pad in a jurisdiction without rent control.").) Such analysis begs the ultimate question for it fails to acknowledge that rent controls may be justified if quasi-monopolistic market conditions have allowed park owners to charge higher rents than would be possible if the market were perfectly competitive. (See, e.g., Cotati Alliance for Better Housing v. City of Cotati (1983) 148 Cal.App.3d 280, 287.) Hirsch and Hirsch take issue with such a theory, arguing

Moreover, if Loretto were not clear enough that a rent control ordinance of the type considered in Hall does not

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that mobilehome rent control ordinance generally penalize landlords "irrespective of the rental rates charged to tenants, the amount of frequency of rent increase, os the profits reaped by particular landlords." (Hirsch & Hirsch, supra, at p. 463.) Such an argument is presumably meant to suggest that not all landlords take advantage of the quasi-monopoly power they may possess.

Here, however, plaintiffs have limited themselves to a facial attack on the ordinance's constitutionality, refusing to seek individualized upward adjustments in the allowable rent as provided for in the ordinance. (See ante, p. _.) As the California Supreme Court has explained, "[W]hether rental regulations are fair or confiscatory depends ultimately on the result reached. [Citation.) That determination, or course, can only be made by analyzing a challenge to the regulation as applied . . . [W]e will [only] declare a regulation invalid on its face 'when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties.' [Citations.]" (Fisher v. City of Berkeley, supra, 37 Cal.3d 644, 679, app. dism. 471 U.S. 1124) Certainly plaintiffs cannot now be heard to complain that the ordinance is indiscriminate in its approach.

constitute a per se taking, that conclusion was punctuated in F.C.C. v. Florida Power Co., supra, 480 U.S. 245, decided six month after Hall. Florida Power involved a federal rent control statute limiting the amount utilities could charge cable television companies for the right to use power poles to string television cable. The Court emphasized that the "element of required acquiescence is at the heart of the concept of occupation." (Id. at p. 252, emphasis added.) The power company contended "it is a taking under Loretto for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79." (Ibid.) Rejecting this contention, the Court responded, "[I]t is the invitation, not the rent, that makes the difference. The line which separates these cases from Loretto is the unambiguous distinction

between a commercial lessee and an interloper with a government license."[10] (Id. at pp. 252-253; accord Eamiello v. Liberty Mobile Home Sales (Conn. 1988) 546 A.2d 805, 818.)

The owners of mobilehome parks in Santa Barbara or Escondido are not required to acquiesce in the occupation of some or all of their property by third persons designated by the government. Nothing requires them to rent their property to mobilehome owners. If they choose to do so, however, the terms on which they may do so are regulated by state statute and local ordinance. Read in light of Florida Power, Loretto in no way suggests that the Escondido ordinance

[10] The Third Circuit in Pinewood Estates v. Barnegat Tp. Leveling Bd., supra, 898 F.2d 347 adopted Hall's reasoning but failed to discuss or even cite Florida Power.

authorizes a permanent physical occupation of the landlord's property and therefore constitutes a per se taking.[11]

C

Whether rent control is a good idea is politically debatable. (See generally, e.g., Salins, Reflections on Rent Control and the Theory of Efficient Regulation (1988) 54 Brooklyn L.Rev. 775.) The

[11] It is true the Court in Florida Power reserved the issue of how Loretto might apply "if the FCC in a future case required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." (480 U.S. at p. 252, fn. 6.) Here, however, even the California Mobilehome Residency Law does not require mobilehome park owners to "refrain from terminating" mobilehome space leases. It simply regulates the economic relationship between the landlord and tenant, requiring that the landlord terminate the space rental only for good cause. As Loretto itself was careful to emphasize, such reasonable regulation of the landlord-tenant relationship has never been viewed as a per se taking. (458 U.S. at p. 440; see also Florida Power, supra, 480 U.S. at p. 252.)

footnotes of the Hall opinion suggest an interest in contributing to that debate. (See, e.g., 833 F.2d at p. 1281, fn. 26.) While we find the topic an interesting one, it is not a discussion we are prepared to join. As we read the opinions of the U.S. Supreme Court and lower federal and states courts, the decision whether to use rent control as a took to correct imperfections in the market system is a political issue for legislative bodies and not a question of constitutional law for the courts. Here, finding no persuasive reasoning to the contrary, we simply reaffirm what we assumed six years ago in Oceanside was accepted constitutional principle.[12]

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[12] We are sensitive to the concerns raised by the dissent that this is a pleading case. We have accepted the allegations of plaintiffs' complaints as true. Our difference with the federal courts in Hall and Pinewood Estates is not based on our respective determinations of

DISPOSITION

Judgment affirmed.

CERTIFIED FOR PUBLICATION

\S\ Wiener
WIENER, Acting P.J.

I CONCUR:

\S\ Work
WORK, J.

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what constitutes a disputed factual issue requiring the taking of evidence. The circuit courts concluded that if the Hall and Pinewood plaintiffs could prove their allegations, they would establish a cognizable takings claim. Assuming proof of the same factual predicates, we would find no taking. The issue is purely a question of law.

In addition, the question of whether the Escondido ordinance is constitutional as applied is simply not before us. Plaintiffs specifically limited their argument to a claim of facial unconstitutionality. Our opinion should not be read to preclude these or other plaintiffs from challenging the ordinance as applied if the appropriate prerequisites (e.g., seeking adjustments from the Rental Review Board) are satisfied.

HUFFMAN, J., dissenting:

This appeal is from an order sustaining a demurrer without leave to amend. As such, we are dealing only with the various pleadings and our inquiry is limited to whether, under the facts pleaded in the complaints, as supplemented by any matter that may properly be judicially noticed, the pleadings state facts sufficient to constitute causes of action for a governmental taking. (Banerian v. O'Malley (1974) 42 Cal.App.3d 604, 611.) The court should not uphold the sustaining of a demurrer without leave to amend if there is a reasonable possibility that a defect in the complaints can be cured by amendment. (Minsky v. City of Los Angeles (1974) 11 Cal.3d 113, 118.)

The majority ignores the procedural posture of these cases and decides a

complex issue without the benefit of evidence. It does this by characterizing the consolidated lawsuit as one challenging the constitutionality of the Escondido ordinance on its face. (Maj. opn., pp. 4-5.) Yet the majority also accurately notes the plaintiffs are alleging it is the combined effect of the application of the ordinance and the state statute which amounts to a compensable "taking" within the Fifth and Fourteenth Amendments to the United States Constitution, and article I, section 19 of the California Constitution. (Maj. opn., p.4.)

As the majority recognizes, facial challenges are different than challenges to the application of otherwise valid statutes and ordinances. (Maj. opn., pp. 13-14, fn. 9.) Although a court may declare a regulation invalid on its face

"when its terms will not permit those who administer it to avoid confiscatory results in its application to the complaining parties . . ." (Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 165), the fairness of confiscatory nature of a facially valid regulation will ultimately depend on analyzing a challenge to the regulation as applied. (See Fisher v. City of Berkeley (1984) 37 Cal.3d 644, 679.) Such challenge generally involves the facts of each particularized case, not just the statute or ordinance in a vacuum.

While the California Supreme Court has set forth a test for a constitutional facial attack of a rent control regulation, it has found it "premature and problematic" to do so for attacks against specific applications of such regulation. (Fisher v. City of Berkeley, supra, 37 Cal.3d at p. 681, fn. 35.) In Fisher,

footnote 35, our Supreme Court carefully noted the requirement mentioned in Birkenfeld that rent controls must provide landlords a "just and reasonable return on their property" was made in reference to a facial challenge to a regulation and concerned the legitimate exercise of local police power in enacting the regulation and not as a constitutional standard for the application of the regulation. (Ibid., citing Birkenfeld v. City of Berkeley, supra, 17 Cal.3d at p. 165.)

The majority appears to use this standard, however, to foreclose plaintiffs from individually challenging the operation of the Escondido ordinance in conjunction with the state statute. (Maj. opn., pp. 6, 13-14, fn. 9.) Admittedly, the complaints as pleaded contain mixed allegations of facial challenges and challenges to the ordinance as applied.

However, because there is a reasonable possibility the plaintiffs could plead causes of action challenging the application of the ordinance combined with the statute as was done in the two United States Circuit Courts of Appeals decision, Hall v. City of Santa Barbara (9th Cir. 1986) 833 F.2d 1270 and Pinewood Estates v. Barnegat Tp. Leveling Bd. (3d Cir. 1990) 898 F.2d 347, upon which plaintiffs rely, I would allow the plaintiffs to amend their complaints.

As the majority makes clear, we are not bound to follow decisions of lower federal courts even on federal questions. However, when two circuits of the United States Courts of Appeals reach the same result to allow a plaintiff to proceed to attempt to prove a physical taking by application of an ordinance, which is inartfully alleged here, I believe this

court should give great deference to those decisions.

The majority criticizes the Ninth Circuit decision in Hall for its failure to cite our earlier decision in Oceanside Mobilehome Park Owners' Assn. v. City of Oceanside (1984) 157 Cal.App.3d 887 and affirms our continued reliance on ". . . what we assumed six years ago in Oceanside was accepted constitutional principle." (Maj. opn., p. 16.) The difficulty, however, with this position is that although the Oceanside opinion discussed a multitude of issues having to do with the Oceanside ordinance dealing with rent control of mobilehome parks, it did not really address the issue now before us. The only discussion that remotely resembles the issue in this case is entirely contained in a few paragraphs which the majority recites as succinctly

concluding the Oceanside ordinance was fairly structured not to reduce rents more than required for the purposes of the police power. (Maj. opn., pp. 7-8.) Respectfully, these paragraphs do not in any fashion analyze the issue presented here. Consequently, there is nothing in our Oceanside opinion which should be cited on the issue and we should perhaps forgive the Ninth Circuit Court of Appeals for its failure to do so.

The majority's principal criticism of Hall and Pinewood is that each opinion relies heavily on the United States Supreme Court decision of Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419. Additionally, Pinewood is criticized for its failure to discuss the later case of FCC v. Florida Power Corp. (1987) 480 U.S. 245. I submit the

majority's criticism of these two circuit court opinions is unwarranted.

Loretto makes clear physical occupation of private property by government action constitutes a taking to the extent of the occupation, regardless of public benefit or economic benefit to the owner. (Loretto v. Teleprompter Manhattan CATV Corp., supra, 458 U.S. at pp. 434-435.) Following Loretto, the courts in Hall and Pinewood allowed the plaintiffs to get past the dismissal stage and attempt to prove a physical taking within the meaning of Loretto. Each held a physical taking was conceptually possible under the theory raised by the pleadings of those plaintiffs.

Moreover, as the majority concedes in a footnote after its discussion of how Florida Power conclusively "punctuates" that the type of rent control ordinances

considered in Hall does not constitute a taking per se, the Supreme Court in Florida Power did not even consider the issue of the cable television/utility rates there under its holding in Loretto. (Maj. opn., p. 15, fn. 11.) Thus the precise issue before this court was not reached. (See FCC v. Florida Power Corp., supra, 480 U.S. 245, 251-252.) The majority's reliance on Florida Power to undercut Loretto and in turn the premise of both Pinewood and Hall is therefore inapposite.

The majority's further attempt to brush this fact aside is not persuasive. As the court in Hall noted, the fact a tenant's right to occupy a space is not truly perpetual does not defeat a claim for taking. (Hall v. City of Santa Barbara, supra, 833 F.2d at p. 1277.) If a property owner is required to allow

tenancy in perpetuity at compensation below market rates unless the space rental is terminated for good cause defined by the ordinance and state statute combined in application, Loretto 8indicates a taking has been shown. I would thus follow the Courts of Appeals in Hall and Pinewood in allowing the plaintiffs to proceed with their cases on this issue.

The majority opinion, although scholarly and well written, draws upon the author's own knowledge and that of text writers and law review commentators for the truth of economic principles. Popcorn and popcorn poppers may be complementary goods, however, analogy to their economic relationship does not assist us in resolving the complex questions of real property economics presented by these pleadings. Thus, I am uncomfortable with

attempting to resolve those issues at this time.

I strongly believe we should allow the parties to amend their complaints so they can put on their respective cases and we can review this important and difficult issue on a full record. I therefore dissent.

CERTIFIED FOR PUBLICATION

\S\ Huffman
HUFFMAN, J.

APPENDIX B

APPENDIX B

Fourth Appellate District, Division One,
Nos. D010307/D010769/D010805/D010942/
D010972/D011011/D011027/D011028/D011030/
D011046/D011115/

S018568

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

JOHN K. YEE, ET AL., Appellants

v.

CITY OF ESCONDIDO, Respondent

And Companion Case

FILED Jan. 24, 1991

Appellant's Petition for review DENIED.

Baxter, J. did not participate.
Lucas, C.J. and Panelli, J. are of the
opinion that petition should be granted.

\S\ LUCAS
Chief Justice

APPENDIX C

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY BRANCH

JOHN K. YEE AND IRENE S. YEE,	CASE NO. N42268
Plaintiffs,	ORDER GRANTING MOTION TO STRIKE PORTIONS OF PLAINTIFFS'
v.	COMPLAINT; SUSTAINING DEMURRER TO
CITY OF ESCONDIDO, a Municipal Corporation and DOES 1 through 10, inclusive,	PLAINTIFFS' COMPLAINT WITHOUT LEAVE TO AMEND; AND DISMISSING ENTIRE ACTION AS TO ALL PARTIES
Defendants.	DATE: Feb. 10, 1989 TIME: 9:00 a.m. DEPT: B

FILED March 30, 1989.

Defendant CITY OF ESCONDIDO'S Motion to Strike portions of Plaintiffs' Complaint and Demurrer to Plaintiffs' Complaint were heard on February 10, 1989,

before the Honorable Don Martinson in Department B of the San Diego Superior Court, North County Branch. Donald R. Lincoln of Endeman, Lincoln, Turek & Heater appeared as counsel for Defendant CITY OF ESCONDIDO. Robert J. Jagiello appeared as counsel for Plaintiffs JOHN and IRENE YEE.

After hearing, the matter was submitted to the Court for a ruling. The court, having read and considered the supporting nd opposing points and authorities and having heard and considered the arguments of counsel, and good cause appearing;

IT IS ORDERED that the following be stricken from the Plaintiffs' Complaint:

1. From page 2, lines 28 to page 3, line 5, the following sentence: "The rent control law has had the effect of depriving the Plaintiffs of all use and

occupancy of its real property and granting to the tenants of mobile homes presently in the Park, as well as the successor in interest of such tenants, the right to physically permanently occupy and use the real property of Plaintiffs."

2. From page 3, line 21, the following words: "of permanent physical occupation of a fixed reduced rent."

IT IS FURTHER ORDERED that the Demurrers to both the First and Second Causes of Action are sustained without leave to amend on the grounds that neither cause of action states facts sufficient to constitute a cause of action pursuant to C.C.P. Section 430.10(e).

IT IS FURTHER ORDERED that the above-entitled action be and it hereby is

dismissed as to all parties with prejudice.

DATED: Mar. 30, 1989

\S\Don Martinson
JUDGE OF THE SUPERIOR COURT

Approved as to form

\S\ Robert J. Jagiello
Robert J. Jagiello
Attorney for Plaintiffs
JOHN and IRENE YEE

APPENDIX D

APPENDIX D

CALIFORNIA MOBILEHOME RESIDENCY LAWS

(EXCERPTS)

ARTICLE 6. TERMINATION OF TENANCY

§ 798.55. Protection from actual or constructive eviction; termination or refusal to renew; reasons; notice; time

(a) The Legislature finds and declares, that because of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation, it is necessary that the owners of mobilehomes occupied within mobilehome parks be provided with the unique protection from actual or constructive eviction afford by the provisions of this chapter.

(b) The management shall not terminate or refuse to renew a tenancy,

except for a reason specified in this article and upon the giving of written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure, to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, as defined in Section 18005.8 of the Health and Safety Code, each junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, and the registered owner of the mobilehome, if other than the homeowner, by United States mail within 10 days after notice to the homeowner addressed to the legal owner and junior lienholder, and the registered owner at their addresses, as set forth in the registration card specified in Section 18091.5 of the Health and Safety Code.

§ 798.56. Authorized reasons for termination

A tenancy shall be terminated by the management only for one or more of the following reasons:

(a) Failure of the homeowner or resident to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after the homeowner receives a notice of noncompliance from the appropriate governmental agency.

(b) Conduct by the homeowner or resident, upon the park premises, which constitutes a substantial annoyance to other homeowners or residents.

(c) Conviction of the homeowner or resident for prostitution or a felony controlled substance offense if the act resulting in the conviction was committed anywhere on the premises of the mobilehome

park, including, but not limited to, within the homeowner's mobilehome.

However, the tenancy may not be terminated for the reason specified in this subdivision if the person convicted of the offense has permanently vacated, and does not subsequently reoccupy, the mobilehome.

(d) Failure of the homeowner or resident to comply with a reasonable rule or regulation of the park which is part of the rental agreement or any amendment thereto.

No act or omission of the homeowner or resident shall constitute a failure to comply with a reasonable rule or regulation unless and until the management has given the homeowner written notice of the alleged rule or regulation violation and the homeowner or resident has failed to adhere to the rule or regulation within

seven days. However, if a homeowner has been given a written notice of an alleged violation of the same rule or regulation, on three or more occasions within a 12-month period after the homeowner or resident has violated that rule or regulation, no written notice shall be required for a subsequent violation of the same rule or regulation.

Nothing in this subdivision shall relieve the management from its obligation to demonstrate that a rule or regulation has in fact been violated.

(e)(1) Nonpayment of rent, utility charges, or reasonable incidental service charges; provided that the amount due has been unpaid for a period of at least five days from its due date, and provided, that the homeowner shall be given a three-day written notice subsequent to that five-day period to pay the amount due or to vacate

the tenancy. For purposes of this subdivision, the five-day period does not include the date the payment is due. The three-day written notice shall be given to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure. A copy of this notice shall be sent to the persons or entities specified in subdivision (b) of Section 798.55 within 10 days after notice is delivered to the homeowner. If the homeowner cures the default, the notice need not be sent. The notice may be given at the same time as the 60 days' notice required for termination of the tenancy.

(2) Payment by the homeowner prior to the expiration of the three-day notice period shall cure a default under this subdivision. In the event the homeowner does not pay prior to the expiration of the three-day notice period, the homeowner

shall remain liable for all payments due up until the time the tenancy is vacated.

(3) Payment by the legal owner, as defined in Section 18005.8 of the Health and Safety Code, any junior lienholder, as defined in Section 18005.3 of the Health and Safety Code, or the registered owner, as defined in Section 18009.5 of the Health and Safety Code, if other than the homeowner, on behalf of the homeowner prior to the expiration of 30 calendar days following the mailing of the notice to the legal owner, each junior lienholder, and the registered owner provided in subdivision (b) of Section 798.55, shall cure a default under this subdivision with respect to that payment.

(4) Cure of a default of rent, utility charges, or reasonable incidental service charges by the legal owner, any junior lienholder, or the registered

owner, if other than the homeowner, as provided by this subdivision, may not be exercised more than twice during a 12-month period.

(5) If a homeowner has been given a three-day notice to pay the amount due or to vacate the tenancy on three or more occasions within tne preceding 12-month period, no written three-day notice shall be required in the case of a subsequent nonpayment of rent, utility charges, or reasonable incidental service charges.

In that event the management shall give written notice to the homeowner in the manner prescribed by Section 1162 of the Code of Civil Procedure to remove the mobilehome from the park within a period of not less than 60 days, which period shall be specified in the notice. A copy of this notice shall be sent to the legal owner, each junior lienholder, and the

registered owner of the mobilehome, if other than the homeowner, as specified in paragraph (b) of Section 798.55, by certified or registered mail return receipt requested within 10 days after notice is sent to the homeowner.

(f) Condemnation of the park.

(g) Change of use of the park or any portion thereof, provided:

(1) The management gives the homeowners at least 15 days' written notice that the management will be appearing before a local governmental board, commission, or body to request permits for a change of use of the mobilehome park.

(2) After all required permits requesting a change of use have been approved by the local governmental board, commission, or body, the management shall

give the homeowners six months' or more written notice of termination of tenancy.

If the change of use requires no local governmental permits, then notice shall be given 12 months or more prior to the management's determination that a change of use will occur. The management in the notice shall disclose and describe in detail the nature of the change of use.

(3) The management gives each proposed homeowner written notice thereof prior to the inception of his or her tenancy that the management is requesting a change of use before local governmental bodies or that a change of use requested has been granted.

(4) The notice requirements for termination of tenancy set forth in Section 798.56 and 798.57 shall be followed if the proposed change actually occurs.

(5) A notice of a proposed change of use given prior to January 1, 1980, which conforms to the requirements in effect at that time shall be valid. The requirements for a notice of a proposed change of use imposed by this subdivision shall be governed by the law in effect at the time the notice was given.

(h) The report required pursuant to subdivisions (b) and (i) of Section 65863.7 of the Government code shall be given to the homeowners or residents at the same time that notice is required pursuant to subdivision (g) of this notice.

§ 798.56a. Notice to management after receipt of notice of termination by legal owner and each junior lienholder; right to sell mobilehome within park

(a) Within 60 days following receipt, or not later than 65 days after the

mailing, of the notice of termination of tenancy for nonpayment, or rent or other charges, the legal owner and each junior lienholder shall notify the management in writing of at least one of the following:

(1) Its offer to sell the obligation secured by the mobilehome to the management for the amount specified in its written offer. In that event, the management shall have 15 days following receipt of the offer to accept or reject the offer in writing. If the offer is rejected, the person or entity shall have 10 days in which to exercise one of the other options contained in this section and shall notify management in writing of its choice.

(2) Its intention to foreclose on its security interest in the mobilehome.

(3) Its request that the management pursue the termination of tenancy against

the homeowner and its offer to reimburse management for the reasonable attorney's fees and court costs incurred by the management in that action.

(b) In the event that the legal owner or junior lienholder exercises any option described in paragraph (2) or (3) of subdivision (a), and has the right to sell the mobilehome within the park to a third party in accordance with this article, that person or entity shall have the right to keep the mobilehome on the site within the mobilehome park until it is resold as long as the person or entity performs all of the following acts:

(a)(A) Satisfies, within the time period specified in subdivision (a), all of the homeowner's responsibilities and liabilities owing to the management for the 90 days preceding the mailing of the notice of termination of tenancy and then

continue to satisfy them as they accrue from the date of the mailing of that notice until the date the mobilehome is resold.

(B) Performance under this paragraph does not cure the default of the homeowner.

(C) For purposes of this paragraph, the "homeowner's responsibilities and liabilities" means all rents, utilities, reasonable maintenance charges of the mobilehome and its premises, and reasonable maintenance of the mobilehome and its premises pursuant to existing park rules and regulations.

(2) Within the time period specified in subdivision (a), commences all repairs and necessary corrective actions so that the mobilehome complies with park rules and regulations in existence at the time the notice of termination of tenancy was

given as well as the health and safety standards specified in Sections 18550, 18552, and 18605 of the Health and Safety Code, and completes these repairs and corrective actions within 90 calendar days of that notice, or before the date the mobilehome is resold, whichever is earlier.

(3) Complies with the requirements of Article 7 (commencing with Section 798.70) as it relates to the transfer of a mobilehome to a third party.

(c) In the event the legal owner or junior lienholder does not respond to the notice provided by management by notifying management in writing of its election pursuant to subdivision (a), or does not satisfy the requirements of subdivision (b), that person or entity shall have no rights to sell the mobilehome within the park to a third party.

(d) In the event the homeowner files for bankruptcy, the periods set forth in this section are tolled until the mobilehome is released from bankruptcy.

(e) Notwithstanding any other provision of law, including, but not limited to, Section 18099.5 of the Health and Safety Code, in the event neither the legal owner nor a junior lienholder, if any, notifies the management of its decision pursuant to subdivision (a) within the period allowed, or performs as agreed within 30 days, the management may either remove the mobilehome from the premises and place it in storage or store it on its site. In this case, notwithstanding any other provision of law, the management shall have a warehouseman's lien in accordance with Section 7209 of the Commercial Code against the mobilehome for the costs of

dismantling and moving, if appropriate, as well as storage, which shall be superior to all other liens, except the lien provided for in Section 18116.1 of the Health and Safety Code, and may enforce the lien pursuant to Section 7210 of the commercial code.

(f) All written notices required by this section shall be sent to the other party by certified or registered mail with return receipt requested.

ARTICLE 7. TRANSFER OF MOBILEHOME OR MOBILEHOME PARK

§ 798.74. Prior approval of purchaser; grounds for withholding; financial information; notice of acceptance or rejection; interview; fee; credit or refund

(a) The management may require the right of prior approval of a purchaser of a mobilehome that will remain in the park

and that the selling homeowner or his or her agent gives notice of the sale to the management before the close of the sale. Approval cannot be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park. In determining whether the purchaser has the financial ability to pay the rent and charges of the park, the management shall not require the purchaser to submit copies of any personal income tax returns in order to obtain approval for residency in the park. However, management may require the purchaser to document the amount and source of his or her gross monthly income or means of financial support.

Upon request of any prospective homeowner who proposes to purchase a mobilehome that will remain in the park, management shall inform that person of the information management will require in order to determine if the person will be acceptable as a homeowner in the park.

Within 15 business days of receiving all of the information requested from the prospective homeowner, the management shall notify the seller and the prospective homeowner, in writing, of either acceptance or rejection of the application, and the reason if rejected. During this 15-day period the prospective homeowner shall comply with the management's request, if any, for a personal interview. If the approval of a prospective homeowner is withheld for any reason other than those stated in this article, the management or owner may be

held liable for all damages proximately resulting therefrom.

(b) If the management collects a fee or charge from a prospective purchaser of a mobilehome in order to obtain a financial report or credit rating, the full amount of the fee or charge shall be credited toward payment of the first month's rent for that mobilehome purchaser. If, for whatever reason, the prospective purchaser is rejected by the management, the management shall refund to the prospective purchaser the full amount of that fee or charge within 30 days from the date of rejection. If the prospective purchaser is approved by the management, but, for whatever reason, the prospective purchaser elects not to purchase the mobilehome, the management may retain the fee, or a portion thereof, to defray its administrative costs under this section.

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN K. YEE AND IRENE S. YEE,	)	CASE NO. 890234 B (CM)
Plaintiffs,	)	ORDER STAYING ACTION PENDING EXHAUSTION OF STATE COURT REMEDIES
v.	)	
CITY OF ESCONDIDO, a Municipal Corporation,	)	DATE: June 7, 1989 TIME: 1:30 p.m. CTRM: 2
Defendant.	)	

FILED June 27, 1989

Defendant City of Escondido's Motion to Dismiss Plaintiffs' Complaint was heard on June 7, 1989, before the Honorable Rudi M. Brewster, United States District Judge, in Courtroom 2 of the above-entitled Court. Donald R. Lincoln of Endeman,

Lincoln, Turek & Heater appeared as counsel for Defendant City of Escondido. Robert J. Jagiello appeared as counsel for Plaintiffs John and Irene Yee.

The Court, having read and considered all moving and responding papers, and having heard and considered the arguments of counsel, it appears and the Court finds that the Plaintiffs have failed to exhaust their State Court remedies prior to filing this action in Federal Court.

IT IS HEREBY ORDERED that this action is stayed pending Plaintiffs' complete exhaustion of all State Court remedies

including appeal.

Dated: Jun 23, 1989

\S\ Rudi M. Brewster
Judge of the District Court

Approved as to form

\S\ Robert J. Jagiello
Robert J. Jagiello

APPENDIX F

APPENDIX F

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN K. YEE and IRENE S. YEE,	) CIV. NO. 89-0234-B (CM)
Plaintiffs,	) ORDER LIFTING STAY
v.	)
CITY OF ESCONDIDO, a Municipal Corporation,	)
Defendant.	)

FILED March 25, 1991

On March 11, 1991, the above captioned matter came on regularly for hearing before the Honorable Rudi M. Brewster. Robert J. Jagiello, Esq., appeared for Plaintiffs, and Donald R. Lincoln, Esq., appeared for Defendant.

Upon consideration of Plaintiffs' Motion for Order Lifting Stay, the papers filed in opposition, and the arguments presented at the hearing, it is hereby ordered:

1. Plaintiffs' Motion for Order Lifting Stay is granted. When the California Supreme Court denied Plaintiffs' petition for review of the Court of Appeal's decision in Yee v. City of Escondido, 224 Cal.App.3d 1349, 274 Cal. Rptr. 551 (1990), Plaintiffs were allegedly denied just compensation for the alleged First Amendment "taking." The court finds that Plaintiffs have thus exhausted their state court remedies as required by Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108 (1985).

2. This Order Lifting Stay does not decide the issue as to whether the rent

control ordinance at issue constitutes a taking. This Order Lifting Stay merely allows the case to continue in federal court without the imposition of the stay entered on June 27, 1989.

IT IS SO ORDERED.

DATED: Mar. 24, 1991

\S\ Rudi M. Brewster
UNITED STATES DISTRICT JUDGE

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APPENDIX G

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN K. YEE and IRENE S. YEE,	CIV. NO. 89-0234-B (CM)
Plaintiffs,	ORDER GRANTING MOTION TO DISMISS
v.	
CITY OF ESCONDIDO, a Municipal Corp.,	
Defendant.	

FILED June 4, 1991.

On May 20, 1991, the above captioned matter came on regularly for hearing before the Honorable Rudi M. Brewster. Robert J. Jagiello, Esq., appeared for Plaintiffs, and Donald R. Lincoln, Esq., and Linda Reich, Esq., appeared for Defendant.

Upon consideration of Defendant's Motion for Reconsideration and Motion to Dismiss, the papers filed in opposition, and the arguments presented at the hearing, it is hereby ordered:

The court has reconsidered its Order filed March 25, 1991, which denied Defendant's Motion to Dismiss on the grounds of res judicata. For the reasons discussed below, the court concludes that this ruling was in error, and finds that the court lacks subject matter jurisdiction to adjudicate whether the Escondido mobile home rent control ordinance constitutes a "taking" pursuant to the Fifth Amendment of the United States Constitution.

a. Procedural Background.

On June 27, 1989, this court stayed the pending action because it found that Plaintiffs' federal constitutional claims

were unripe. Plaintiffs had failed to exhaust the state court procedures for recovery of just compensation for a "taking" of property as required by Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

Plaintiffs returned to state court, but they pursued both their federal and state constitutional claims. On October 31, 1990, the California Court of Appeal for the Fourth District issued its opinion in Yee v. City of Escondido, 224 Cal. App. 3d 1349 (1990). The Court of Appeal held that the challenged ordinance did not constitute a taking of property under either the California or the United States Constitution. The California Supreme Court denied Plaintiffs' Petition for Review on January 24, 1991.

Having exhausted the state court procedures, Plaintiffs returned to this

court and requested the court lift the stay. At the same time, Defendants brought a Motion to Dismiss on the ground that the federal suit was now barred by res judicata. On March 11, 1991, this court lifted the stay and denied Defendant's Motion to Dismiss.

b. The Pending Motion for Reconsideration.

Defendant requests the Court reconsider its denial of Defendant's Motion to Dismiss on the grounds of res judicata.

The court finds that the federal constitutional issues were fully litigated in Yee v. City of Escondido, 224 Cal. App. 3d 1349 (1990). This decision was a valid, final judgment on the merits.

The full faith and credit clause of 28 U.S.C. § 1783 provides that "judicial proceedings . . . shall have the same full

faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . ." Thus, a state court judgment commands the same res judicata effects in federal court that it would have in the court that entered it. The federal district courts are courts of original, and not appellate, jurisdiction. Thus, the proper forum for review of the judgment in Yee v. City of Escondido is the United States Supreme Court, and not the United States District Court. See Rooker v. Fidelity Trust co., 263 U.S. 413, 415-16 (1923) (only the United States Supreme Court can entertain a proceeding to reverse of modify a judgment of a state court for error); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 484-85 (1983) (a federal district court has no authority to review final judgments of a state court

even if the state court decision involves federal constitutional principles).

The court is aware that the interplay between Williamson - which requires exhaustion of state court procedures for a federal taking claim to ripen - and the doctrine of res judicata have placed Plaintiffs in a curious, and frustrating position. By satisfying the exhaustion requirement and litigating the federal claim in state court, Plaintiffs are now barred from litigating the federal claim in federal court. However, the court is unaware of any applicable exception to res judicata which would allow this court to relitigate the federal constitutional issue.[1]

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[1] In a factually similar case, a district court in New Jersey reached the same conclusion. Peduto v. City of North Wildwood, 696 F.Supp. 1004 (D.N.J. 1988), affirmed, 878 F.2d 725 (3d Cir. 1989) (Plaintiff collaterally estopped from relitigating the federal taking claim

Because this court lacks subject matter jurisdiction, dismissal is proper pursuant to Fed. R. Civ. P. 12(b)(1).

IT IS SO ORDERED.

DATED: Jun 4, 1991

\S\ Rudi M. Brewster
UNITED STATES DISTRICT JUDGE

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since the federal claim had been fully litigated in the state court as required by Williamson).

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

John J. Yee and
Irene S. Yee

v.

City of Escondido,
a Municipal Corporation

JUDGMENT IN A CIVIL CASE

CASE NO. CV 89-0234-B (CM)

FILED June 12, 1991

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that because this court lacks subject matter jurisdiction, dismissal is proper pursuant to Fed. R. Civ. P. 12 (b) (1).

Date June 12, 1991

WILLIAM L. LUDDY
Clerk

M. Marner
(By) Deputy Clerk